

**STATE OF INDIANA  
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

|                                     |   |                              |
|-------------------------------------|---|------------------------------|
| <b>IN THE MATTER OF</b>             | ) |                              |
| <b>THE PERMIT OF</b>                | ) |                              |
|                                     | ) |                              |
| <b>SCOTT ALAN ROBERTS</b>           | ) | <b>PERMIT NO. RR12-21979</b> |
| <b>d/b/a ROBERTS SOUTH FORK PUB</b> | ) | <b>RR12-21980</b>            |
| <b>105 SOUTH GLICK STREET</b>       | ) |                              |
| <b>MULBERRY, INDIANA 46058</b>      | ) |                              |
|                                     | ) |                              |
| <b>Applicant.</b>                   | ) |                              |

**PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. BACKGROUND OF THE CASE**

The Applicant, Scott Alan Roberts, 105 South Glick Street, Mulberry, Indiana 46058 (“Applicant”), permit numbers RR12-21979 and RR12-21980, is the applicant for a Type 103 and a Type 210-1 Alcohol and Tobacco Commission (“Commission” or “ATC”) permits.<sup>1</sup> The application was assigned to the Clinton County Local Alcoholic Beverage Board (“Local Board”). On or about August 9, 2005, the Local Board heard the application request and voted 4-0 to grant the application for the new permits. The Commission adopted the Local Board’s recommendation on October 19, 2005.

Remonstrator William R. Warwick (“Mr. Warwick”) filed a timely notice of appeal and the matter was assigned to the Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing on May 18, 2006, and at that time, witnesses were sworn, evidence was heard, and matters were taken under advisement. Applicant was represented by Mark C. Webb. The remonstrator was represented by Sean Persin. This Hearing Judge, having reviewed the tape-recorded transcript of the Local

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<sup>1</sup> Beer, wine and liquor (restaurant) located in an incorporated area with a population of less than 20,000 persons. This permit does not allow carryout and requires an accompanying Type 103 or Type 111 permit available on the quota system. See IC 7.1-3-20-11.5.

Board hearing, the evidence submitted to the Commission during the appeal hearing (“ATC Hearing”), and the contents of the entire Commission file (“ATC File”), now tenders her Proposed Findings of Fact and Conclusions of Law to the Commission.

## **II. EVIDENCE BEFORE THE LOCAL BOARD**

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
1. Scott Roberts, applicant;
  2. Mike Roberts, Lafayette Police Officer and a brother of Scott Roberts;
  3. Joanne Hamilton, a resident of Mulberry;
  4. Tom Baker, a resident of Mulberry; and
  5. Jerry Foltz, a resident of Mulberry.
- B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:
1. Petition list of signatures obtained in support of the permit application as of October 5, 2005; and
  2. Letter from the Town of Mulberry Town Council expressing its approval for the issuance of the new permits in this cause.
- C. The following individuals testified before the Local Board against the Applicant in this cause:
1. William Warwick, prior owner of the permit premises;
  2. Thomas Hoehner, pastor, Mulberry United Methodist Church; and
  3. Eileen Walden, a member of Mulberry United Methodist Church.
- D. The following evidence was introduced and admitted before the Local Board against the Applicant:
1. Certificate of Occupancy for Abba’s Place, dated September 23, 2005.

## **III. EVIDENCE BEFORE THE COMMISSION**

- A. The following individuals testified before the Commission in favor of the Applicant in this cause:
1. Scott Roberts. Mr. Roberts testified that he is the owner of the permit premises and also owns and maintains rental properties throughout Clinton County. He

testified that he has lived in Clinton County all of his life, and has grown up in the Mulberry-Dayton area. Mulberry has a population of approximately 1000 residents. His father and his father's three brothers previously owned the permit premises for a number of years until selling it to Mr. Warwick in 1985. Mr. Roberts purchased the permit premises and all of its contents in a foreclosure sale in July 2005. Mr. Warwick's permit, RR12-06006, was not offered as part of the foreclosure sale. In order to obtain an ATC permit for the premises, Mr. Roberts first approached Mr. Warwick about the price of permit RR12-06006. Mr. Warwick wanted \$80,000 for the permit RR12-06006. Believing that price to be unreasonable, Mr. Roberts contacted the ATC and was informed that he could purchase a three-way permit without carryout for the actual application price, the option he ultimately chose.

When Mr. Roberts went to take possession of the premises, he discovered that most of the personal property had been removed from inside the premises. Mr. Roberts has invested approximately \$200,000 to improve the premises. It is now an attractive family restaurant with a separate bar area that seats 148 persons. It is the only three-way restaurant in Mulberry. It has a full service menu with child-friendly selections. Mr. Roberts testified that there was overwhelming support from town residents in support of this restaurant, and indicated that since he opened on May 15, 2006, that business has been very good. Mr. Roberts felt that his restaurant with its ATC permit would be a positive addition to Mulberry, and indicated that without his restaurant, one would have to travel to either Lafayette or Frankfort, 12 miles west, or 10 miles east, respectively, or to Rossville or Clarkshill, 8 miles to the north or approximately 8 miles to the south, respectively, in order to find three-way restaurant service.

2. Gregory T. Genrich. Mr. Genrich owns Bradford & Riley, Inc., an Indianapolis-based alcoholic beverage permit brokerage firm with a statewide practice, which has been in existence since 1972. Mr. Genrich testified that the market for a Type 210 permit in a town such as Mulberry is very limited and with Type 210-1 being available, it reduces the demand. Mr. Genrich placed a fair value on this permit at between \$3,000 and \$5,000 dollars.

3. Mark Judge. Mr. Judge is a self-employed individual who lives outside Mulberry. He is very familiar with Mulberry and with the permit premises, having been a patron there during the time that Mr. Robert's family owned it as well as when Mr. Warwick owned it. He testified that Mrs. Warwick, Mr. Warwick's wife, approached him and offered to sell him the permit for \$50,000 and told him that he could turn around and sell it immediately to Mr. Roberts for \$75,000. Mr. Judge declined to purchase Mr. Warwick's permit.

B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. Plat map of Mulberry, Indiana, depicting the location of Mulberry United Methodist Church;
2. Bill of Sale for the permit premises, August 2, 2005;
3. Photographs of the permit premises, depicting interior and exterior conditions of the premises prior to the renovation work performed by Mr. Roberts;
4. Exhibit in 33 parts – photographs of the renovation and repairs made by Mr. Roberts to the permit premises;
5. Petition in support of permit application containing 458 signatures from the residents of the town of Mulberry, October 5, 2005;
6. Petition in support of permit application containing 52 signatures from the residents of the town of Mulberry, signed after October 5, 2005;
7. Menu for Roberts South Fork Pub; and
8. Floor plan for the permit premises.

C. The following individuals testified before the Commission against the Applicant in this cause:

1. William R. Warwick. Mr. Warwick is the holder of a permit number RR12-06006, which was located at the permit premises until he lost the permit premises in a foreclosure proceeding. Mr. Warwick stated that he purchased that permit from Mr. Robert's father and uncles for the sum of \$60,000. He stated that he tried to get a Sunday sales permit but was unable to do so because there was a church located within 200 feet of the permit premises. He was unable to continue operation of the business and lost it in a foreclosure action. Mr. Warwick stated that because he had to purchase his Type 210 permit from the Roberts for the above price, that his asking price of \$80,000 was not unreasonable.

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

1. Photograph of "Abba's Place," a youth activities center owned by the Mulberry United Methodist Church and located across the street from the permit premises;
2. Flyer showing the offering of the "Kid's Club" at Abba's Place; and
3. Certificate of Occupancy Application for Abba's Place, dated September 23, 2005.

#### **IV. FINDINGS OF FACT**

1. The Applicant, Scott Alan Roberts, d/b/a Roberts South Fork Pub, 105 South Glick Street, Mulberry, Indiana 46058, permit numbers RR12-21979 and RR12-21980, is the applicant for a Type 103 and a Type 210-1 ATC permits. (ATC Files).

2. Applicant filed his application with the ATC on August 9, 2005. (ATC Files)

3. Said application was heard by the Clinton County Local Alcoholic Beverage Board on October 5, 2005, and approved by a 4-0 vote. (ATC Files; Local Board Hearing).

4. Applicant is not disqualified from holding the permit. (Local Board Hearing; ATC Hearing; IC 7.1-3-4-2).
5. Applicant is a life-long resident of Clinton County, whose father and uncle owned the permit premises for a period of time back in the 1950s and 1960s. (Local Board Hearing; ATC Hearing).
6. Until July of 2005, the permit premises was owned and operated by Mr. Warwick with an accompanying ATC permit type 210, permit number RR12-06006. (ATC Files; ATC Hearing).
7. While the permit premises was owned by Mr. Warwick, it was the only three-way retail permit located in Mulberry. (ATC Records).
8. The town of Mulberry has a population of approximately 1000 persons. (ATC Hearing).
9. In 2003, Mr. Warwick was charged with narcotics crimes in Clinton County under the cause number 12D010310 FD120. (ATC Hearing).
10. On or about July 13, 2005, Mr. Warwick was sentenced pursuant to a plea of guilty to 6 months in jail and placed on probation for 1 ½ years in the above matter in Clinton County. (ATC Hearing).
11. On or about July 22, 2005, Mr. Warwick was charged with multiple narcotics crimes in Tippecanoe County under the cause number 79D010507FB00037. (ATC Hearing).
12. Applicant purchased the real estate encompassing 105 South Glick Street out of foreclosure proceedings. (ATC Hearing).
13. When Applicant took possession of the permit premises, the building and

contents were in a considerable state of disrepair, was closed, generating no income or sales and was a blight in the center of the town. (Local Board Hearing; ATC Hearing).

14. Mr. Warwick attempted to sell his permit, RR12-06006, to the Applicant for \$80,000, which offer was rejected by Mr. Roberts. (ATC Hearing).

15. Mr. Warwick has been unable to sell the Type 210 permit. (ATC Hearing).

16. On March 16, 2006, the Commission made the permit RR12-06006 inactive. This permit will be subject to the 2006 ATC public auction. See IC 7.1-3-22-9; 905 IAC 1-33.1-1(b)(1); IC 7.1-3-4-2(a)(3) (permittee cannot continue to hold a permit without having a proper location).

17. The actual value of Mr. Warwick's permit is in the range of \$3,000 to \$5,000. (ATC Hearing; Testimony of Genrich).

18. Applicant has invested significant amount of money in repairs and renovations to the permit premises. (ATC Hearing).

19. The permit premises is now an attractive family restaurant with a separate barroom. (ATC Hearing).

20. The permit premises is the only active three-way permit restaurant in the town of Mulberry. (ATC Hearing; ATC Records).

21. Applicant has overwhelming support of the town's residents as well as residents of the surrounding communities for the permit application. (ATC Hearing).

22. Applicant submitted a petition containing over 500 signatures of people in favor of the issuance of a permit at the proposed permit premises, evidencing a desire to receive the services of the Applicant at the proposed permit premises. (ATC Hearing;

Local Board Hearing).

23. The First United Methodist Church of Mulberry agreed to Applicant's request for a two-way permit but opposed to the issuance of a three-way permit, citing the presence of "Abba's Place," a youth recreation center owned by the church, and located across the street from the permit premises. (Local Board Hearing; ATC Hearing).

24. The First United Methodist Church of Mulberry is not a remonstrator before the Commission on this matter. (ATC File; Local Board Hearing).

25. Abba's Place is not the main building nor office of the church and is not physically attached to or a part of the Mulberry United Methodist Church. Regular church services are held in the main sanctuary of the church, located 2 blocks south of the permit premises. (ATC Hearing; Local Board Hearing).

26. The permit premises is not located within 200 feet of a church or a school. (Local Board Hearing; ATC Hearing).

27. Applicant's employees are extensively trained to avoid issues regarding the sale of alcoholic beverages to underage persons. (ATC Hearing).

28. The services of the Applicant at the proposed permit premises would have a positive impact on other businesses in the neighborhood or community in which the proposed permit premises is located. (Local Board Hearing; ATC Hearing).

29. Without these permits, residents of Mulberry would have to travel to Frankfort (10 miles east) or to Lafayette (12 miles west) in order to receive similar services. (ATC Hearing).

30. The proposed permit premises is not in a residential district. IC 7.1-1-3-8; IC 7.1-3-19-13; 905 IAC 1-18-1.



31. Any finding of fact may be considered a conclusion of law if the context so warrants.

## **V. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter. IC 7.1-1-2-2; IC 7.1-2-3-9.

2. The permit application was properly submitted. IC 7.1-3-1-4.

3. The Commission is authorized to act upon proper application. *Id.*

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the Commission file. IC 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* IC 4-21.5-3-27(d).

6. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); IC 4-21.5-3-27(d).

7. Applicant is a fit and proper applicant and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1.

8. Applicant is of good moral character and in good repute in the community in which it does business and is qualified to hold the permit it seeks. IC 7.1-3-4-2(a)(2)(A).

9. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

10. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*

11. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).

12. "Desire" means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).

13. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*

14. There exists an opening on the quota system in Mulberry, Clinton County, Indiana, for a Type 103 permit. IC 7.1-3-22-3.

15. Because the Applicant applied for an available type 103 permit, he was eligible to request a three-way type 210-1 permit because Mulberry has a population of less than 20,000. IC 7.1-3-20-11.5.

16. There is a need for the services of the Applicant at the proposed permit premises. (Local Board Hearing; ATC Hearing).

17. Applicant submitted a petition containing over 600 signatures of people in favor of the issuance of a permit at the proposed permit premises, evidencing a desire to receive the services of the Applicant at the proposed permit premises. (ATC Hearing; Local Board Hearing).

18. The services of the Applicant at the proposed permit premises would have a positive impact on other businesses in the neighborhood or community in which the proposed permit premises is located. 905 IAC 1-27-4(d).

19. For purposes of alcoholic beverage code, the plain and ordinary meaning of the word “church” includes the building regularly used for worship, along with appurtenances, rooms and facilities which pertain to the administration of that worship which are under one roof and constitutes a part of that building. *Taylor Drug Stores, Inc. v. Indiana Alcoholic Beverage Commission*, 497 N.E.2d 932, 936 (Ind. Ct. App. 1986); IC 7.1-3-21-11.

20. There is a difference between a building used for a “church purpose” and a “church.” Board of *Zoning Appeals of City of Indianapolis v. Wheaton*, 76 N.E.2d 597, 601 (Ind. Ct. App. 1948). Structures such as convents, parsonages and parochial schools may be examples of buildings used for “church purposes,” but a building used for divine worship is a “church.” *Id.*; See also *In the Matter of the Permit of CVS Scottsburg*, permit number DL72-19980.

21. The proposed permit premises does not violate IC 7.1-3-21-11 and is located more than 200 feet from a church or a school. (ATC Hearing).

22. Even assuming that Abba’s Place is a “church” within the meaning of IC 7.1-3-21-11, the prohibition contained in that statute does not apply because a permit had already been issued for the premises, namely, RR12-06006. IC 7.1-3-21-11(b) (“Except as provided in subsection (c), the commission shall not issue a permit for a premises if a wall of the premises is situated within two hundred (200) feet from a wall of a school or

church, if no permit has been issued for the premises under the provisions of Acts 1933, Chapter 80.”) (emphasis added).

23. The proposed permit premises is not in a residential district as referred to in IC 7.1-1-3-8, IC 7.1-3-19-13 and 905 IAC 1-18-1.

24. The Commission may not reverse the Local Board’s action in granting the application of a permit if it finds that the Local Board’s decision was: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. IC 7.1-3-19-11.

25. Substantial evidence is the standard to be applied by the Commission in review of the record of proceedings. Substantial evidence requires something more than a scintilla, and less than a preponderance of evidence; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Indiana Alcoholic Beverage Commission v. River Road Lounge*, 590 N.E.2d 656, 659 (Ind. Ct. App. 1992); see also *Roberts v. County of Allen*, 773 N.E.2d 850, 853 (Ind. Ct. App. 2002).

26. Based on the entire record, the Local Board’s decision to grant the Applicant’s permit is based on reasonable and sound evidentiary support, and is, therefore, supported by substantial evidence. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100, 104 (Ind. Ct. App. 1993).

27. The Local Board’s decision in granting the issuance of permit to the Applicant was not (1) arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. IC 7.1-3-19-11.

28. Any conclusion of law may be considered a finding of fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the initial determination of the Alcohol and Tobacco Commission to grant the permits to the Applicant, Scott Alan Roberts, 105 South Glick Street, Mulberry, Indiana 46058, permit numbers RR12-21979 and RR12-21980, was based on substantial evidence and must be sustained. It is further ordered, adjudged, and decreed that the evidence adduced at the ATC hearing was in favor of the Applicant and against Remonstrator William R. Warwick. The appeal in this matter is denied and the initial decision of the Commission is sustained.

Dated: \_\_\_\_\_

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U-Jung Choe  
Hearing Judge